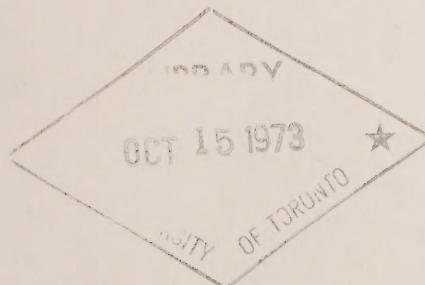


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# Green Paper on Consumer Product Warranties in Ontario



*The Hon. John T. Clement*

## PREFACE

Warranty law in Ontario is no longer adequate to meet the needs of the consumer in today's marketplace. That is the overall message to be taken from the 1972 Ontario Law Reform Commission Report on Consumer Warranties and Guarantees in The Sale of Goods which was commissioned by my Ministry.

In its review of the Commission Report, my Ministry has concluded that the consumer currently must rely almost exclusively upon the conscience of the individual businessman who has become the sole arbiter of what his warranty means and how it is applied. We believe that this dependency lacks the consistency and means of redress that the average citizen needs.

At the same time, current practices have resulted in an uneven distribution of responsibilities for warranties among businessmen. We believe that a responsible business community will welcome a clarification and redistribution of responsibilities for consumer warranties.

The clarification required has been identified by the Commission in its analysis of *The Sale of Goods Act*. The principle shortcomings identified by the Commission are as follows:

It proceeds from the fictitious premise that the parties are bargaining from positions of equal strength and sophistication and it uses concepts to describe and distinguish between different types of obligations that are now obsolete and difficult to apply. It supplies a framework of remedies for breaches of the seller's obligations that are unrelated to practical realities. Especially serious is the Act's preoccupation with the bilateral relationship between the seller and the buyer, which totally ignores the powerful position of the manufacturer in today's marketing structure. This results, at least in the Anglo-Canadian law, in shielding the manufacturer from contractual responsibility to the consumer. By the same token the law has largely ignored the impact of manufacturers' express warranties and the defects in their contents and administration. Finally, our sales law is private law and it has failed to provide any meaningful machinery for the redress of consumer grievances. This last weakness is perhaps the most serious of all weaknesses, for as has been frequently observed, a right is only as strong as the remedy available to enforce it.

My Ministry is committed to a wide-reaching reform of warranty law in 1974. We have accepted the need for a new Consumer Products Warranties Act to update and replace key sections of *The Sale of Goods Act* as they apply to consumer transactions.

This new legislation will affect all segments of Ontario's economy, including consumers, retailers, distributors, manufacturers, suppliers of parts and raw materials and advertisers. Its potential impact makes broad consultation with consumers and businessmen essential.

The purpose of this Green Paper is to highlight the issues raised by the Law Reform Commission Report, to encourage public response on how these issues should be resolved and to indicate the direction of my Ministry's thinking on some of these issues.

This Paper does not attempt to provide answers to all the problems that commonly occur in warranty matters. Many questions are left unanswered and those positions that have been taken are still open to discussion. What we do want more than anything else at this stage is a public debate on what rights and remedies consumers should have when products fail to meet reasonable expectations.

For a fuller legal discussion of the issues, interested readers should turn to the Ontario Law Reform Commission Report itself.

Additional copies of the Green Paper and the Commission Report are available from the Queen's Printer, Queen's Park, Toronto. To make submissions or comments, please write to:

Warranties in Ontario  
The Ministry of Consumer and  
Commercial Relations  
555 Yonge Street  
TORONTO, Ontario

We would appreciate hearing from you by November 30, 1973.



John T. Clement  
Minister of Consumer  
and Commercial Relations  
Province of Ontario  
August 16th, 1973

The Green Paper is not designed as a statement of government policy. Rather, it outlines several alternative policy positions which a government is considering and it affords an opportunity for citizens or groups to respond.

— Quoted from the Committee on Government Productivity Interim Report #3.

## CONTENTS

	Page	
<b>SECTION 1</b>	<b>Existing Law and Proposals for Change . . . . .</b>	<b>3</b>
	Implied Warranties and Conditions under Existing Law	
	Express Warranties under Existing Law	
	The Need for Change	
	A New Concept of Warranty	
<b>SECTION 2</b>	<b>The Basic Statutory Warranty . . . . .</b>	<b>6</b>
	Warranty of Title	
	Warranty of Quiet Possession	
	Warranty of Freedom from Encumbrance	
	Warranty in Sales by Description	
	Warranty of Fitness	
	Warranty of Merchantability	
	Warranty of Durability	
	Warranty of Availability of Spare Parts and Servicing Facilities	
<b>SECTION 3</b>	<b>Disclaimer Clauses . . . . .</b>	<b>10</b>
	The Sale of Goods Act	
	The Consumer Protection Act	
	The Law Reform Commission	
<b>SECTION 4</b>	<b>The Manufacturers' Supplementary Warranties . . . . .</b>	<b>13</b>
	False Advertising of Manufacturers' Warranties	
<b>SECTION 5</b>	<b>Priority and the Question of Liability . . . . .</b>	<b>16</b>
	The Doctrine of Priority of Contract	
	The Manufacturers' Liability	
	Damages and Disclaimers'	
	The Definition of a Manufacturer	
	The Retailers' Liability	
	The Retailers' Rights Against the Manufacturer	
	Horizontal Priority	

<b>SECTION 6</b>	<b>What the Salesman Says . . . . .</b>	<b>20</b>
	The Parol Evidence Rule	
	Contracts and Clauses Denying	
	Salesmen's Representations	
<b>SECTION 7</b>	<b>The Consumer's Rights and Remedies . . . . .</b>	<b>22</b>
	A Proposal on Remedies	
	Measurement of Damages	
	Existing Redress Procedures	
	The Commission Proposal for Redress Procedures	
	Choosing a System of Redress Procedures	
<b>SECTION 8</b>	<b>The Scope of the New Legislation . . . . .</b>	<b>28</b>

## SECTION 1

### EXISTING LAW AND PROPOSALS FOR CHANGE

The Ministry of Consumer and Commercial Relations has concluded from its experience that Ontario's consumers are often not receiving adequate quality and servicing for the products that they buy. Some product fault is probably inevitable in today's mass production, high technology economy but it should not be the consumer who must accept the risks and losses associated with the purchase of inadequate products.

The problem facing the Ministry is what rights the consumer should have when an item which he has purchased does not meet his expectations. On what basis can the consumer justify asking for a replacement or repair or defective goods?

The traditional legal approach to this question has always been to look at the contract or reopen the transaction in order to determine exactly what the expectations of the parties were. In its efforts to reconstruct the bargaining process, the law has long recognized that a sale transaction involves more than a simple exchange of money for goods. What is particularly important are those things said or implied during the formation of the contract that gave rise to the consumer's expectations. What induced the consumer to buy that particular product? Was it a statement in a television commercial or something said by the salesman?

In a sales transaction any number of inducements could have given rise to the consumer's expectations. Under existing sales law, the major inducements have been classed into a number of categories. There is, however, a basic distinction between those that exist in every transaction unless excluded by contract (these are termed implied warranties and conditions), and those that are given only in the process of a specific transaction (express warranties).

#### Implied Warranties and Conditions Under Existing Law

Implied warranties and conditions are difficult to understand because they are the artificial creations of sales law. They are "promises" that the seller is always presumed to have made unless he excludes them through the use of a disclaimer clause, (a practice which is discussed in Section 3). Because implied warranties and conditions are presumed to have been included, rather than actually said, the consumer is often unaware that they exist at all.

The implied warranties and conditions are to be found in the Ontario *Sale of Goods Act*. Eight other Canadian provinces have similar statutes based upon the English *Sale of Goods Act* of 1893 which was meant to be a codification of commercial practice based upon earlier court decisions.

When the English Act was written, its central premise was that commercial transactions took place between knowledgeable buyers and sellers, and that certain things could therefore be voluntarily excluded from sales contracts. The Act provided that in every sale transaction, there were to be implied certain warranties and conditions which were deemed a part of each sale unless the parties clearly expressed an intention to exclude them. These warranties and conditions are the same as those we rely on today in the Ontario *Sale of Goods Act* and include such matters as the seller's right to sell the goods, their fitness and merchantability, and the similarity between samples and the goods actually delivered.

When the English Act was drafted in the Victorian era, no one could have foreseen the consumer market of North America in the 1970s. Consequently, the interpretation and

application of the terminology used in the Act has often confused the public. Although laymen speak of "guarantees", that word is not to be found in modern law. The law speaks only of "warranties" and "conditions". A condition has come to mean an essential term of a contract, the breach of which entitles the buyer to reject the goods and sue for damages, while a warranty is a less important term, the breach of which entitles the buyer to sue for damages but not to reject the goods. Whether a specific term is a condition or a warranty is always a question of fact to be decided in each case. The consumer is almost always unaware of which terms are warranties and which terms are conditions as in his mind the salesman's "guarantee" covers everything. Thus, it is impossible for him to predict in advance exactly what his rights and remedies are.

### Express "Warranties" Under Existing Law

Whether or not the warranties and conditions implied by *The Sale of Goods Act* apply in a specific transaction, other statements made by the retailer or manufacturer may have induced the consumer to make a purchase. The consumer's expectations may have been prompted by an advertisement or brochure, by oral statements made by the salesman or by some written promise by the manufacturer or retailer usually in the form of a "warranty" or "guarantee". Inducements over and above those implied by *The Sale of Goods Act* have been put by the courts into a confusing number of categories — fundamental obligations, warranties, collateral warranties, affirmations of fact, "mere puffs" and fraudulent or innocent misrepresentations — each giving rise to different rights and remedies. The most common and important of these extra inducements is the manufacturer's express warranty, or "guarantee" as it is often called.

Usually, the purchaser is content with his "guarantee" whether it is oral or printed to look like a government bond. But if the product breaks down or does not live up to his expectations, the consumer more often than not discovers that the fancy document that is supposed to be a "guarantee" is really a disclaimer which attempts to limit or remove the implied warranties and conditions of *The Sale of Goods Act*. Thus what looks like good protection in the bold print disappears in the fine print. The unwitting buyer, when he accepts the seller's warranty or signs his contract is often giving away valuable rights and remedies implied by law. This means that if the product is deficient he has no basis upon which to recover his loss.

If the warranty is of any value at all, it is often severely restricted with different terms applying to different components. Thus the purchaser may find himself paying for some portion of parts, labour or transportation costs.

Once again, as with implied warranties and conditions, the express warranty has often become a source of confusion rather than a source of protection and assurance for the consumer.

### The Need for Change

In the Ministry's experience, very few people actually understand the nature or extent of the warranties they are now given, whether express or implied. Even fewer, when faced with a disclaimer clause, will continue a dispute over defective merchandise notwithstanding the fact that the disclaimer may not stand up in court. A proliferation of legal terms and categories, and different approaches to assigning responsibility for defective goods in Canada and the United States have contributed to the consumer's sense of confusion and frustration. The Ministry therefore proposes to re-establish and modernize the principles contained in *The Sale of Goods Act* in keeping with our legal traditions and to balance the relationships between the consumer, retailer and manufacturer in today's markets.

## A New Concept of Warranty

The Ministry of Consumer and Commercial Relations accepts the need for a modernization and simplification of consumer warranties. The approach which it favours is to replace the present system of warranties and conditions with a new definition of warranty that provides a basic minimum standard to all transactions with the provision that the retailer or manufacturer may give supplementary warranties over and above the basic minimum as they may see fit. These supplementary warranties would give rise to essentially the same rights and remedies as the basic statutory warranty.

This proposed new warranty system would have two basic components:

**Basic Statutory Warranty:** Every consumer product transaction will carry a basic statutory warranty to be provided by law. These warranties would be based upon the implied warranties under *The Sale of Goods Act* as revised to meet present conditions. The basic statutory warranty is discussed in Section 2.

**Supplementary Warranty:** Retailers and manufacturers would also have the right to give such additional warranties to the consumer as they may see fit to make. These warranties, whether made by a salesman or in an advertisement or a document accompanying the goods, would apply over and above the basic statutory warranty.

Much of this paper is devoted to a discussion of what would be required to support such a system of warranty law.

At an early stage in the development of the proposed new warranty, consideration must be given to the range of inducements that would give rise to a supplementary warranty and which would therefore confer upon the consumer the rights and remedies associated with the new warranty system.

Among the definitions of warranty suggested to the Ministry is the one in the *United States Uniform Sales Act*, which says that "any affirmation of fact or any promise by the seller is an express warranty if the natural tendency of such any affirmation is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon". This definition excludes mere language of commendation or praise. The Commission does not support excluding these inducements, claiming that to do so would be to underestimate the influence of modern advertising techniques on the consumer's buying decisions.

An example of a definition that does not exclude language of commendation or praise is found in the *Manitoba Consumer Protection Act*, which says that "every claim by a seller regarding the quality, condition, quantity, performance or efficacy of goods or services that is (a) contained in an advertisement or (b) made to a buyer; shall be deemed to be an express warranty respecting those goods or services".

The Ministry has not yet decided upon a definition of this proposed new-style warranty or reached a conclusion as to the range of inducements that would be included. Comments and advice are invited.

## SECTION 2

### THE BASIC STATUTORY WARRANTY

The basic statutory warranty that we propose is really a re-affirmation and modernizing of the principles already contained in *The Sale of Goods Act*, but which have not been a part of standard market practice because of the use of disclaimer clauses and public confusion over what the responsibilities of the seller are.

What should be included in the basic statutory warranty? If this warranty is to be applied to a wide variety of goods, considerable thought must be given to its content. The Commission's proposals to the Ministry are based on an extension of the principles found in the present *Sale of Goods Act* and include such well accepted ideas as title, quiet possession, freedom from encumbrance, description, fitness and the various components of merchantability. These proposals are discussed below.

#### Warranty of Title

The seller warrants that he has the right to sell the goods. Problems of title are rare in the case of new goods but do exist in some circumstances in the sale of used goods.

#### Warranty of Quiet Possession

The buyer will receive a warranty that he will have and enjoy quiet possession of the goods. This does not pose a problem in current practice except where there is an undisclosed prior conditional sales contract or some other claim on the goods.

#### Warranty of Freedom from Encumbrance

The goods are warranted to be free from any charge or encumbrance in favour of a third party that has not been declared or made known to the buyer before or at the time when the contract is made.

#### Warranty in Sales by Description

In a contract for a sale of goods by description or sample, i.e., where the actual goods cannot be inspected by the buyer and he must rely on the seller's description, *The Sale of Goods Act* provides an implied condition that the goods will correspond with the description or sample.

There are three separate questions identified by the Commission concerning sales by description. First, should the warranty on sales by description be treated as implied when the description of the goods usually forms an express part of the contract? The Commission recommends that the warranty be treated as an express warranty (a supplementary warranty in the Ministry's System).

Secondly, should a sale in a self-service store be considered a sale by description? In other words, should the warranty apply when an item is picked off the shelf by the consumer without any consultation with the retailer? If so, then should the retailer become responsible for a product about which he has never expressed an opinion or which he has probably never inspected himself?

Finally, should the seller be considered responsible for labels and other descriptive matter attached to or accompanying the goods when they have been attached or furnished by the manufacturer or distributor? There are three options — only the person affixing the label will be liable, the retailer is liable if he adopts the label, or the retailer is

liable regardless of whether or not he adopts the label.

The Commission recommends that the retailer be liable for the contents of all labels and other descriptive matter accompanying the product.

The Ministry is not prepared to accept or reject the Commission recommendations regarding the warranty of sale by description or sample at this time. Comment and advice is invited.

## Warranty of Fitness

The warranty of fitness for a particular purpose ordinarily applies only when the buyer makes known to the seller the purpose for which the product is required, thereby indicating reliance on the seller's skill or judgement. In addition, the warranty of fitness usually applies only to goods that the seller normally sells and therefore is likely to know. The warranty does not apply when the buyer asks for a specific article under patent or brand name because in this case the buyer is presumed to know what he is asking for.

The Ministry accepts the need to extend the warranty of fitness so as to reflect modern marketing practices. There are, however, four questions regarding the extension of the warranty which the Ministry believes will need to be considered carefully in consultation with businessmen and consumers.

- (a) Should the warranty of fitness for purpose apply only where the goods are the kind that the seller usually sells or should it be extended to cover all sales in which the seller is acting in the course of business?
- (b) Should the warranty be extended to sales of specified articles under patent or other trade names?
- (c) Should the buyer need to make known his reliance on the seller's skill and judgement by telling him the intended purpose or should the warranty be implied automatically unless the circumstances indicate otherwise?
- (d) Should the warranty apply only to unusual or special uses of products or to all normal or usual purposes?

## Condition of Merchantability

The implied condition of merchantability under *The Sale of Goods Act* has been the subject of many court cases because of the imprecise meaning of merchantability. The generally accepted definition derives from the case of *Bristol Tramways v. Fiat Motors*: "The condition that goods are of a merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and therefore knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms."

The issue is whether this definition of merchantability should be retained or replaced with a wider one which would form the basis of what the Commission calls a "warranty of consumer acceptability". This warranty would deal with the following issues not satisfactorily covered by the present interpretation.

**Used Goods:** Should the warranty of merchantability — or of fitness for that matter — apply to used goods? This is not to suggest that used goods must be in a perfectly fit state or as good as a new product of the same kind. The Commission recommends that each case would need to be decided on its own merits, having regard to the age of the goods, the price paid for them and all the other surrounding circumstances.

A similar approach is raised for discussion regarding the warranty of durability which is discussed later in this section. In both cases, the emphasis is on what is reasonable. This approach allows for wide latitude of interpretation by the courts.

**Goods suitable for more than one use:** Both fitness and merchantability are involved in this problem area.

In *Kendall v. Lillico*, the House of Lords held that goods are merchantable if they are fit for some of the purposes for which the goods are normally used even though they are unfit for other purposes, equally normal, as long as there are buyers who are willing to buy the goods with the same defect and still pay the same price for them. Thus a product fit for general use may actually be harmful in specific circumstance. No claim could be made by the aggrieved party as there could be others interested in the product for similar but not identical purposes. Thus goods may be acceptable to one person for one purpose, but not acceptable to another person who requires them for a different purpose.

The alternative is to repeal the decision in *Kendall v. Lillico* relating to multiple use. This would put the burden of warning the consumer that the goods are not fit for all their regular purposes upon the retailer or the manufacturer (which one is another issue). In the absence of the warning or common knowledge the warranty of merchantability would protect the consumer.

## Warranty of Durability

The Commission, following examination of the relevant legal authorities, recommended that the implied condition of merchantability be expanded to include a requirement that the goods (including, where appropriate, the individual components) should be durable for a reasonable length of time having regard to the price and the other surrounding circumstances. This would provide an overriding right to bring legal action in unusual circumstances. Normally, the manufacturer's or retailer's express warranty will be sufficient protection for the public in the matter of durability. However, the Commission believes it is advisable to permit access to the courts under the basic statutory warranty. We invite comment.

## Warranty of Availability of Spare Parts and Servicing Facilities

The Law Reform Commission has recommended that the existing concept of merchantability should also be expanded to imply a warranty obligation to carry spare parts and to provide servicing facilities. It is argued that a durable product, however well manufactured and however excellent in quality, will be worthless if replacement parts are not available or are only available with much delay, or if servicing facilities are inadequate or non-existent.

The principle recommended is similar to that for durability, i.e., products will carry a warranty that reasonable spare parts and repair facilities will be available. The meaning of "reasonable" would be open to interpretation by the courts for both the warranty of durability and the warranty of spare parts and servicing. Thus a consumer will have access to a court in situations where parts or repair facilities do not meet reasonable needs. This principle does not require a minimum inventory or repair facility. It could apply to both retailers and manufacturers.

A more rigid alternative would be the setting of mandatory inventory and service standards on an industry basis. This latter alternative may be difficult to administer and increases the likelihood of reduced product availability in smaller communities. In addition, such a provision would likely place a greater burden upon smaller manufacturers

and retailers, thereby decreasing their size of market. The Ministry is vitally interested in receiving comments on this far reaching series of recommendations. In particular, response would be appreciated on the present market situation and the manner in which a warranty of availability of spare parts would affect it.

## SECTION 3

### DISCLAIMER CLAUSES

#### The Sale of Goods Act

The provisions of *The Sale of Goods Act* relating to implied warranties and conditions were based on the concept that such warranties would apply unless the contract provided otherwise. Sellers have therefore taken up the practice of including in their contracts disclaimer clauses that deny responsibility for some or all of the characteristics of their goods. It is not surprising that disclaimer clauses have been introduced into almost every sales agreement with the result that consumers have frequently lost their access to the courts.

Disclaimer clauses can be designed to exclude all representations, warranties and conditions, written or oral, express or implied, statutory or otherwise and may or may not substitute express warranties. Other disclaimer clauses may limit the damages recoverable or describe the goods as "with all faults" or "as is" or required complaints to be lodged within a certain period. In other cases, the buyer may be required to acknowledge that the goods are in good condition and that they conform to the terms of the contract.

It has been difficult to reconcile disclaimers with what actually happens during a sales transaction. *The Sale of Goods Act* permits the seller to capitalize on the buyer's inability to produce proof of the promises made by the seller while the seller can produce a written contract containing a clause stating that no representations were ever made. This presents consumers with serious problems in that sales literature and other sales tools play an important part in the consumer's understanding of the transaction.

Canadian courts have not been unaware of this situation and they have frequently acted to avoid giving effect to the seller's disclaimer. One method used has been to consider the breach of the contract by the seller as being so fundamental that it voided the entire contract. The result was that there was no sale to which the disclaimer could apply. Unfortunately, few consumer warranty cases have been taken to the higher courts and in practice disclaimer clauses have usually been effective in discouraging the consumer from legal action, particularly where the amounts involved were not large.

#### How consumer protection can help

The Ministry of Consumer and Commercial Relations has taken two steps toward a resolution of disclaimer problems. The first was to request a special study of consumer warranties by the Law Reform Commission which was completed in 1972 as a part of the continuing review of the entire *Sale of Goods Act*. It is this special report which has given rise to this Green Paper. The second action was the passing of an amendment to *The Consumer Protection Act* voiding the effect of clauses that purported to negate or vary the implied warranties and conditions of *The Sale of Goods Act*. This amendment was to provide consumers with access to the courts until a more comprehensive reform of warranty law could be completed. It is known as Section 44a of *The Consumer Protection Act* and reads as follows: —

- 44a(1) In this section, "consumer sale" means a contract for the sale of goods made in the ordinary course of business to a purchaser for his consumption or use, but does not include a sale,
  - (a) to a purchaser for resale;
  - (b) to a purchaser whose purchase is in the course of carrying on business;

- (c) to an association of individuals, a partnership or a corporation;
- (d) by a trustee in bankruptcy, a receiver, a liquidator or a person acting under the order of a court.

(2) The implied conditions and warranties applying to the sale of goods by virtue of *The Sale of Goods Act* apply to goods sold by a consumer sale and any written term or acknowledgement, whether part of the contract of sale or not, that purports to negative or vary any of such implied conditions and warranties is void, and if a term of a contract, is severable therefrom, and such term or acknowledgement shall not be evidence of circumstances showing an intent that any of the implied conditions and warranties are not to apply.

## The Law Reform Commission

The Commission recommends the adoption of a strengthened version of Section 44a of *The Consumer Protection Act* in the Consumer Products Warranties Act. This would in effect prohibit most if not all disclaimer clauses. In the development of this important recommendation, the Commission considered the arguments for and against disclaimer clauses. The arguments usually made by manufacturers in favour of disclaimer clauses are:

- (a) Disclaimers reduce the liability for the cost of repairs, enabling the producer to predict more accurately his costs and thus the price to be charged for the product.
- (b) Disclaimers reduce the risk of introducing new products which may require adjustment or further development.
- (c) It is unfair to hold retailers responsible for defects in goods produced by someone else.
- (d) In the sale of used goods, it is unreasonable to hold the retailer responsible for defects which may have been caused by the previous owner.

Arguments against disclaimer clauses are:

- (a) Disclaimer clauses place the entire burden of loss on the consumer, who may be least able to bear it.
- (b) The consumer is not in an equal bargaining position since he must accept the disclaimer to buy the goods.
- (c) The consumer generally knows nothing about the effect of a disclaimer clause because of their complexity and legal wording.
- (d) Innovation should not take place at the expense of the unsuspecting consumer.

The Ministry supports the position taken by the Commission that disclaimer clauses in consumer transactions have proved an unfair limitation on the consumer. The Ministry therefore supports the continuation and strengthening of the concept of Section 44a of *The Consumer Protection Act* and its introduction into the new Consumer Products Warranties Act.

Having accepted the desirability of limiting disclaimers, the Ministry recognizes that important issues remain to be considered. As already noted in Section 1, the Ministry's proposed concept of warranty includes the right of retailers and manufacturers to issue supplementary warranties over and above the basic statutory warranty. Should the use of disclaimer clauses also be prohibited in the case of supplementary warranties? In response to this important question, the Law Reform Commission has suggested an absolute prohibition of all disclaimers at the outset of the new Consumer Products Warranties Act, with the possibility that this be reviewed in the light of experience. The Ministry is of the view that this area should be the focus of as much public comment as is possible to determine the feasibility of implementing the Ontario Law Reform Commis-

sion recommendations as they relate to supplementary warranties.

One of the consequences of prohibiting disclaimer clauses entirely is the fact that limits would be removed from liability for consequential damages. The Ministry invites comment on the implications of accepting this provision as it relates to consequential damages.

## SECTION 4

### THE MANUFACTURERS' SUPPLEMENTARY WARRANTIES

A major factor influencing consumer purchase decisions, particularly of such items as cars and household appliances, is the manufacturers' written warranty normally attached to the goods. The Commission concluded the consumer does derive some benefit from manufacturers' warranties, and that the best approach is to remove objectionable elements in existing practices rather than to discourage the use of these warranties themselves. As a result, the Ministry has proposed a system that will provide a basic statutory warranty on all products supplemented by such additional promises as the retailer or manufacturer chooses to make. As discussed earlier, although such representations may be made by advertisement, pamphlet or salesmen's representations or other means, the majority of them have taken the form of manufacturers' warranties accompanying the products.

At present, manufacturers' warranties are subject to criticism for several reasons. They are often used as competitive sales devices and not to guarantee the consumer that his purchase is of reasonable quality. Advertising of warranties is often misleading. There is a lack of uniformity among warranties, making it difficult for the consumer to understand them or to compare them from product to product. Some warranties are ambiguous, with wording that seems to say one thing in one place but contradicts or re-interprets itself in another place. Finally, some warranties are simply unconscionable, since they really provide little protection to the consumer and may even attempt to limit the seller's obligations while appearing to provide the consumer even more protection.

The Ministry believes it is essential that if a written supplementary warranty is given, it must make clear to the consumer exactly what the manufacturer is promising above and beyond the basic statutory warranty. There are a number of alternatives open to the Ministry on how to ensure that supplementary warranties are effective and clearly presented:

- (a) Encouraging industries to undertake voluntary simplification and clarification of warranty terms and improved performance of services offered under the warranty;
- (b) Establishing government guidelines setting out minimum content and disclosure requirements and perhaps standardized forms for supplementary warranties;
- (c) Requiring repair and service facilities for all manufacturers that offer supplementary warranties.

The Ministry supports the Commission recommendation that formal guidelines should apply to the form and content of all written warranties. The Commission proposal is as follows:

The following guidelines should apply to the form and content of all written warranties, for all used as well as for all new goods sold in Ontario, except where the unique warranty problems of a particular industry require some modification by means of (specific government: ed.) regulations:

- (a) The warranty shall state clearly the name and address of the person offering the warranty;
- (b) The warranty shall be clearly legible (unless the size of the product makes this an unreasonable requirement, e.g., a lighter or a watch) and shall refer only to one product or to one product classification;
- (c) The warranty shall not be deceptively worded;

- (d) In particular the term "warranty" or "guarantee" shall not be used in the caption or the document unless
  - (i) the promisor undertakes at least to repair or replace any malfunctioning part free of charge to the consumer or to make him a fair allowance on account of the defective product on the purchase of a new product of comparable price and quality; and,
  - (ii) the warranty covers all the major components of the product;
- (e) The document shall state clearly the duration of the warranty but different periods may be stated for different components of the products;
- (f) The document shall state clearly the procedure for the presentation of a claim under the warranty;
- (g) No warranty shall make the warrantor or any person related to him commercially the sole judge whether a product is defective or whether the buyer is otherwise entitled to present a claim;
- (h) The recognition of a claim under the warranty shall not be made contingent on the buyer returning the product to the manufacturer or selling dealer, at his own expense or otherwise, where the requirement is an unreasonable one;
- (i) Subject to the regulations, a warranty shall not exclude or limit the express or implied warranties otherwise created by law or the buyer's right to claim damages or other forms of relief for breach of the express or implied warranties or for breach of the written warranty;
- (j) Every written warranty shall state clearly that its terms are in addition to any rights or remedies the buyer may have under the Act unless the Act or its regulations permits the exclusion or limitation of the statutory warranties.

The Ministry further supports the principle that the Ontario Government work with all interested parties in the development and regulation of supplementary warranty practices.

In this regard, the measures specifically recommended by the Commission include:

- (1) The scope of the proposed Consumer Products Warranties Act (should ed.) include provisions that empower the Ontario Government to regulate all aspects of express performance warranties, whether given by manufacturers or other supplies, and their administration.
- (2) The proposed Act should deal with ensuring the availability of spare parts and general service facilities.
- (3) The proposed Act must contain strong and realistic enforcement provisions.
- (4) Subject to the guidelines contained in the Report of the Royal Commission Inquiry into Civil Rights, the proposed Act should contain basic guidelines in as much detail as it practicable and create and employ a regulation-making power to complete the legislative scheme and to adjust it to the circumstances and needs of particular industries.
- (5) The proposed Act should contain a provision requiring that every regulation made thereunder be tabled in the Legislature within fifteen days, and stand referred to an appropriate Committee of the Legislature.
- (6) The proposed Act should include the power to require by regulation the adoption of standard form warranty documents and retail sales agreements, where such are desirable and practical for certain types of products.

The Ministry would welcome suggestions from the public on these recommendations.

### False Advertising of Manufacturers' Warranties

The Ministry accepts the Commission recommendations that false advertising of warranties be prohibited under the Consumer Products Warranties Act. The Commission recommendation reads as follows:

**The Consumer Products Warranties Act should contain a prohibition against the making of any false, misleading or deceptive statements by a manufacturer or distributor in any advertisement, circular, pamphlet or other representation to the public with respect to the terms, conditions or benefits to the consumer or any warranty that he offers or purports to offer, or that he indicates is offered in relation to the goods by any distributor or retailer with whom he deals.**

## SECTION 5

### PRIVITY AND THE QUESTION OF LIABILITY

#### The Doctrine of Privity of Contract

With the pattern set for the application of a new approach to warranty law, it is important to determine whether or not the proposed law will apply to all of the persons who will be using the products concerned and whether responsibility will extend not just to sellers but to manufacturers as well. In existing law, warranty rights under *The Sale of Goods Act* are limited to those who actually purchase the goods and even they are prevented from suing the manufacturer because they have no direct contractual relationship. In legal terms, this means there is no privity of contract between the consumer and the manufacturer. Thus privity as it relates to consumer transactions simply means that relationship that exists between the actual buyer and the actual seller. In simplified terms only these two parties have rights against each other. The parties are usually the consumer and the retailer, leaving the manufacturer free of liability under contract law.

There are two types of privity that need our examination:

- (a) **Vertical Privity:** Vertical privity refers to the relationships that exist along the distribution or merchandising chain, e.g., between the buyer and the retailer or the manufacturer and the retailer. The key issue is whether or not the consumer who buys the goods from the retailer should also be given the right to proceed against the manufacturer in the case of product fault even though the manufacturer was not one of the two parties in the sales transaction?
- (b) **Horizontal Privity:** Horizontal privity refers to the relationships that exist between the original purchaser and other users of the product. The key issue is whether or not the spouse of the consumer who enters into the contract should not also have a claim against the retailer or the manufacturer, although the spouse was not one of the two parties in the sale transaction?

The dominant role in many areas of modern marketing is played by the manufacturer, who is frequently responsible not only for the manufacturing, but also for the distribution, advertising, quality control, warranties, availability of parts and servicing, labels and sales literature. The manufacturer often has far greater control over the marketing of the goods than the average retailer, who may be merely a conduit between the manufacturer and the purchaser.

In practice however, the contract of sale is between the consumer and the retailer, and this means privity of contract exists only between these two parties. The consumer has no privity of contract with the manufacturers. This lack of privity with the manufacturer means that if the consumer has a warranty problem, many procedural and substantive difficulties may prevent him from pursuing the manufacturer directly. This is the problem of vertical privity.

Similarly, if a consumer resells or makes a gift of goods to another consumer, the second consumer is faced with even greater procedural and substantive problems preventing action against either the retailer or the manufacturer, because he does not have a contract with them. These problems also apply to friends or relatives of the owner who use the product with the owner's consent. In the case of defective goods, although the actual purchaser would have rights against the retailer, the purchaser's spouse would have none because the contract was not signed by the spouse. This is the problem of horizontal privity.

The Ministry believes that existing law has not provided an efficient remedy for consumers where there is not privity of contract. It is also difficult to justify the disparity between the responsibilities of retailers and manufacturers. Therefore it is proposed that the new legislation on warranties should permit consumers to make direct claims against both retailers and manufacturers similar to those that they may now make against retailers with whom they have a contract.

If the application of the doctrine of privity is revised, the following subject matters must be fully considered.

## The Manufacturers' Liability

If liability is to be imposed upon the manufacturer, it can be characterized in two ways. The first way is through the law of tort, in which the consumer must prove negligence on the part of the manufacturer. This can, for example, presently be done by proving that reasonable care has not been exercised in the manufacture of the product. This is a very difficult process for the consumer.

The alternative would be to impose liability under the proposed warranty law. The Ministry supports the Commission characterization of liability as falling under sales rather than tort law. The sales law approach has the advantage of placing the manufacturer on the same footing as the retailer.

Having accepted the principle of manufacturers' liability under sales law, the question arises as to whether the manufacturer should be liable for the full range of warranties included under the basic statutory warranty. The Commission recommends that the manufacturers' liability should be the same as the retailers' liability, with some adjustment for warranty of title (in which the manufacturers' role is rarely an issue). The Commission also recommends that, in the case of sale by sample, the manufacturer should be responsible under the warranty only if the sale by sample is made with the express or implied agreement of the manufacturer. In the case of the warranty of fitness for a particular purpose, the Commission recommends manufacturers' liability if the retailer has notified the manufacturer of the particular purpose for which the goods are required by the consumer, or if the manufacturers' advertisement or other form of representation indicates the particular purpose for which the product should be used.

## Damages and Disclaimers

The Commission recommends that the manufacturer should be liable for damages to the same extent and measure that the retailer is. As a result, the consumer would have essentially the same remedies against the manufacturer as against the retailer, thus providing a single set of remedies based upon the concept of warranty. The Ministry is not prepared to accept this recommendation without discussion of the situations that could result.

The result of denying the application of the doctrine of privity would be to treat the manufacturer as party to the original contract. In the case of a breach of that contract, the manufacturer would be liable for the same measure of damages as is now recoverable from the retailer. That is, the rule in *Hadley v. Baxendale* as codified in Section 51 of *The Sale of Goods Act* would be applied. Thus in a specific situation the manufacturer might be liable for economic losses, property damage or personal injuries arising directly or consequently from the breach.

Should this reallocation of risk seem unreasonable on the basis of submissions received, the Ministry feels that liability could be reduced in either of two ways. The first

would be to specify by statute what measure of damages would be allowed. Such specification would have to be in greater detail than s. 51 of *The Sale of Goods Act*.

The second would be to allow disclaimer clauses limiting the extent and measure of the manufacturers' liability for breach of contract. If disclaimers are allowed, should the manufacturer be required to give notice of the disclaimer to the consumer in writing or in some other manner that could be reasonably expected to come to the buyer's attention in the ordinary course of events?

## The Definition of a Manufacturer

Because of the greatly expanded liability that manufacturers may be subject to if the new concept of warranty is adopted, considerable care must be taken in the development of a definition of a "manufacturer". Options suggested by the Commission include:

- (1) Any person who manufactures or assembles the goods, except if the goods are manufactured or assembled for another person who attaches his own brand name to the goods.
- (2) Any person who describes himself or holds himself out to the public as the manufacturer of the goods.
- (3) Any person who attaches his brand name to the goods.
- (4) In the case of imported goods, if the manufacturer does not have a regular place of business then the importer could be designated as the manufacturer of the goods.

It should be understood that in the above definitions, a person is meant to include corporations, partnerships or individuals.

The Ministry has not committed itself to any one definition or set of definitions at this time and welcomes suggestions as to approach. However, the Ministry does accept the importance of including within the final definition some means of ensuring that equivalent liability is assumed by foreign manufacturers of imported goods as would be assumed by domestic producers.

## The Retailers' Liability

The Commission recommends that if a consumer sues the manufacturer, the retailers' liability to that consumer should still remain. There are three main reasons that tend to support this recommendation. First, some department stores are of very large size and may actually dwarf many smaller manufacturers. Secondly, if the retailer were generally relieved of his liability, he might not be as strongly motivated to select wherever possible the most responsible manufacturer on behalf of the consumer. Third, it will likely remain easier for the consumer to gain redress from the retailer, even after changes in the doctrine of privity, because of the recognized market value to the retailer of a healthy relationship with the consumer.

The Ministry accepts these arguments and is prepared to retain retailer liability even if the consumer proceeds against the manufacturer first.

## The Retailers' Rights Against the Manufacturer

If the consumer has the right to proceed against either the retailer or the manufacturer and chooses to proceed against the retailer, some provision may be needed that will enable the retailer to share the liability with the manufacturer where this appears to be appropriate to the circumstances of the case.

Two different situations need consideration. First, if the retailer obtains goods from a distributor and there is no contract between him and the manufacturer, the Ministry

accepts the Commission recommendation that the retailer be entitled to "vouch over" against the manufacturer. This means that the retailer would have the right to bring the manufacturer into the action as a defendant.

Secondly, if the retailer and manufacturer do have a contract, but a disclaimer or some other restricting clause prevents the retailer from suing the manufacturer, the Commission recommends that the disclaimer should be subject to judicial scrutiny and that the court be granted the power to declare the disclaimer to be unenforceable in whole or in part if it is judged to be unreasonable. The attractiveness of this proposal is that it avoids the extremes of permitting the full use of disclaimers or of prohibiting them outright. This proposal recognizes that situations may exist where disclaimers are justified between retailers and manufacturers. At the same time the proposal offers a measure of protection to the small businessman. The Ministry tentatively accepts this proposal, subject to the views presented to it.

### Horizontal Privity

The Ministry supports the recommendation that persons deriving their interest in the goods from or through the original purchaser, whether by purchase, gift, operation of law or otherwise shall have rights equal to, but not greater than, those of the original purchaser. This means, for example, that the purchaser's family and those to whom he gives the product as a gift, will have rights equal to those of the purchaser.

## SECTION 6

### WHAT THE SALESMAN SAYS

The system of warranties as developed in the previous section of this paper recognizes two main types of warranties — the basic statutory warranty, which is included in every sales transaction — and the supplementary warranty, which is the result of representations made by the seller or manufacturer. The objective of this two-fold system is to make the seller and the manufacturer responsible for the quality of the product and the promises they make about it. In this way, the consumer's expectations are most likely to be met.

There is a serious obstacle to the full implementation of this approach and that is that verbal representations made by salesmen are often not admissible in court proceedings as a result of the application of the parol evidence rule.

#### The Parol Evidence Rule

Parol evidence means spoken evidence. As a general rule, such oral evidence will not be accepted by a court to contradict, alter or vary a written agreement. This rule has resulted in many problems in consumer transactions because many of the buyer's expectations arise from statements made to him by the salesman prior to or during the sale. In many instances, the sales talk is the most important factor in closing the sale. If the goods purchased under the written agreement prove defective, the buyer is prevented by the parol evidence rule from raising the salesman's representation in support of his argument that he should receive compensation for defects in the goods.

In existing practice, if there is a dispute as to the terms of a contract then it is up to the courts to determine exactly what the parties intended. If the contract is a verbal one, it is a question of who the court believes. If the contract is completely in writing, the courts have limited the parties to what has been included in the written document, whatever the salesman might have said.

Exceptions to the parol evidence rule have been made, as follows:

- (a) Evidence may be presented to show a custom or trade usage which will help put the contract into context;
- (b) Evidence may be presented to show that the contract was dependent upon the occurrence of some condition precedent;
- (c) Evidence may be presented to show that the parties intended the contract to be partly oral and partly written and to show what the oral terms are.

Many courts have seized upon the last exception to give effect to oral representations, but this approach lacks the consistency and clarity desirable in a new Consumer Products Warranties Act.

The Ministry believes that the parol evidence rule should be abolished for consumer transactions and that evidence of representation to the consumer which do not appear in the written agreement should be made admissible in court.

#### Contract Clauses Denying Salesmen's Representations

The Commission has also recommended that effect should be denied in consumer transactions to clauses denying the authority of agents or employees of the seller to make representations which otherwise would fall within the scope of their authority. The Commission report states: "This recommendation does not mean that a principal will be bound by the representation of every employee however much they may be outside the

usual or ostensible scope of the employee's authority. It will simply restore the consumer's right to give evidence of what was said to him and then leave the significance of the representation to be governed by the usual rules of agency". This proposal follows logically from the recommendation relating to the abolition of the parol evidence rule in consumer transactions. The Ministry therefore accepts the proposal to deny effect to contract clauses denying salesmen's representations.

## SECTION 7

### THE CONSUMER'S RIGHTS AND REMEDIES

#### A Proposal on Remedies

Assuming the consumer is provided with a two level warranty consisting of a basic statutory warranty and such supplementary warranty as may be provided by the retailer or manufacturer, it becomes necessary to consider what remedies the consumer should have, how he might enforce them, and what role the government should play in assisting him to exercise them.

In law the consumer's remedies presently depend upon the technicality of whether a warranty or a condition has been breached. In the case of a breached warranty, the consumer is not entitled to reject the goods, but he may sue for damages or a reduced price. In the case of a breached condition, the consumer is entitled to reject the goods and sue for damages. The decision as to whether it is a breach of warranty or a breach of a condition that has occurred is made by the court according to the circumstances of each situation.

In practice however, the consumer usually does not go to court but rather takes the goods back to the seller or manufacturer and asks that they be repaired or replaced. While a substantial number of both retailers and manufacturers have accepted this as a legitimate function of business, a disappointing number appear to be unconcerned that the consumer's reasonable expectation of the goods has not been met. In this light, the question is what remedies the consumer should have.

The possibilities include:

- (1) The right to have the goods repaired or replaced.
- (2) The right to cancel the sales transaction in all cases.
- (3) The right to cancel the transaction and to claim for damages over and above the purchase price if damages have been suffered.
- (4) The right to claim for damages or a reduction in price, but not to cancel the sale and return the goods.
- (5) A combination of the above remedies, depending upon circumstances.

The Commission concludes that "... the consumer's remedies should be flexible in character and should reflect the varying circumstances which may arise in practice." The Commission recommends the following solutions:

- (a) Where the breach is remediable and the breach is not of a fundamental character, the retailer or manufacturer shall have a reasonable opportunity to make good the breach, including any breach in the implied warranties of title, freedom from encumbrances, and quiet possession.

"Breach of a fundamental character" means

- (i) that the product departs significantly in characteristics and quality from the contract description; or
- (ii) that the product is substantially unfit for its ordinary or specified purpose; or
- (iii) that the product, in its existing condition, constitutes a potential hazard to the health or property of the purchaser or any other person.

- (b) Where the defect is of a fundamental character and appears within a reasonable period after delivery of the product to the purchaser, the purchaser may reject the product and shall be entitled to a refund of the purchase price, subject to a reasonable deduction for the use of the goods. The purchaser

shall also be entitled to recover any other damages which he may have suffered, subject to the usual tests of foreseeability.

- (c) In other cases, (non-fundamental breach: ed) where the defect has not been remedied within a reasonable time, the purchaser shall have the option of rescinding the contract as under (b) or having the defect remedied elsewhere and recovering the cost thereof from the retailer or manufacturer, together with any other reasonably foreseeable damages which he may have suffered.
- (d) Where the dealer is being sued for a breach that is basically attributable to the manufacturer he shall have a right to "vouch over" and to be indemnified by the manufacturer in respect of any damages that the purchaser may recover from him, unless he is precluded from doing so by the terms of the agreement between him and the manufacturer.

The Ministry accepts this proposal in principle. We are anxious to receive advice on the implementation of this approach and its impact on business practices.

## Measurement of Damages

The Commission recommends continuation of the rule in *Hadley v. Baxendale* as found in Section 51 of *The Sale of Goods Act* which sets out the buyers measure of damages for breach of warranty. The Ministry accepts this recommendation, which means that the present method of measuring damages would be retained in the Consumer Products Warranties Act.

At present, the right to disclaim liability for consequential damages is exercised by many sellers and manufacturers. If the Commission's recommendations eliminating all disclaimer clauses is accepted, the question arises as to whether any exceptions should be made. The Ministry invites response on this matter.

## Existing Redress Procedures

Once the framework of the proposed legislation has been established, decisions must be made on the actual procedures to be made available for obtaining redress. The Ministry is recommending changes in warranty laws that have the potential for greatly enhancing the individual consumer's rights. The question then becomes one of determining what redress procedures must be instituted to provide clear and simple remedies when those rights have been denied. Considerable discussion and open dialogue on the nature of the warranty law to be established must take place in order that the nature and scope of the remedial machinery can be properly assessed.

The Commission has reviewed a wide range of remedial processes, each of which has been found wanting in some respect. It would appear that no single approach will be suitable but that a combination of remedies will be required. The approaches considered were:

**Greater Use of Small Claims or Division Courts:** The procedures in these courts are informal and fast, but professional legal assistance will still prove necessary and this is expensive, even at this level.

**Legal Aid:** Legal aid is rarely given to pursue civil cases such as would be involved with warranties. Consideration could be given to providing assistance in the small claims court on warranty matters.

**Entitlement to Legal Costs:** California law allows a successful consumer plaintiff to receive his legal costs, apparently without any ceiling and regardless of the size of the judgment. It is doubtful that this one rule change would encourage many consumers to go to court.

**Class Actions:** It has been argued that while a single claim might not justify the costs of going to court, many claims represented by a single (class) action would significantly reduce the costs. The Consumer Protection Bureau could also be allowed to bring class actions in its name so as to maximize its legal resources.

Several serious questions have been raised as to the effectiveness of class actions for consumers. Class actions presuppose a common grievance and a common remedy. This degree of commonality may well exist in the case of false advertising or an unconscionable clause in a contract but most complaints involving product defects involve goods manufactured and purchased at different times from different retailers under differing circumstances. Further, class action procedures apply to legal matters other than warranties. Before permitting class actions generally, it would be necessary to undertake considerable research into class action procedures and their effect on other areas of the law.

**Test Cases:** The Consumer Protection Bureau could be given the power to introduce test cases either in the name of the consumer or in its own name to establish in practice the extent and nature of consumer rights under the proposed new Consumer Products Warranties Act. The procedure would be similar to that currently permitted under *The Constitutional Questions Act*. Test cases would only be appropriate in a few situations but they could provide a vehicle for establishing and giving wide recognition to the consumer's legal position with regard to product fault and other broad issues.

**Industry Sponsored Dispute Settlement Procedures:** An industry sponsored system of complaint management has attractive features but those systems currently in existence do not make arrangements for involving independent expert judgement on consumer claims. Nor is every company within an industry likely to participate, and frequently it is the troublesome practitioner who does not join the industry association sponsoring the redress procedures. In addition, not all industries appear to be prepared to institute voluntary complaint redress procedures at this time.

**Government Mediation:** The Consumer Protection Bureau has been operating as a mediator of consumer complaints since it was established in 1967. It would be possible to expand this role and the Commission recommends that this be done.

**Swedish Arbitration System:** In Sweden, a Central Complaints Bureau has been established with a full time staff and arbitration committees which are organized on an industry basis. The Bureau first attempts to mediate complaints on its own. If the complaint cannot be resolved in this way, it is passed on to the arbitration committee responsible for the industry involved. These committees meet in the absence of the parties to consider expert opinion on the individual case. Product testing may be requested. Written judgments are prepared and given wide publicity. If there is a conflict of evidence between the parties, the committee will direct that matter be taken to court.

These are some of the redress procedures currently in use in certain jurisdictions and which should be evaluated before a final choice is made on the redress procedures to be included in the Consumer Products Warranties Act. Based upon its own review and evaluation, the Commission recommended an extensive package of redress procedures.

## The Commission Proposal for Redress Procedures

The Commission has proposed a comprehensive new system for remedial machinery. This proposal is a thorough and inclusive recommendation on redress procedures and it is deserving of close study. It is reproduced in full below to assist in the development of informed response on the subject of redress procedures.

The Commission recommends that:

1. *The Consumer Protection Bureau Act* should provide that the Consumer Protection Bureau has the duty, in appropriate cases, to request that the Attorney General seek to initiate proceedings to refer any matter with respect to a warranty complaint to the courts under the provisions of *The Constitutional Questions Act*.
2. The proposed Consumer Products Warranties Act should contain a section under which a reference as described in recommendation 1, above, in respect of a matter arising under the proposed Act, is specifically authorized. Such a section might read as follows:

The Lieutenant Governor in Council may refer to the Court of Appeal or to a judge of the Supreme Court for hearing and consideration any matter arising under or in connection with this Act that he thinks fit, and the court or judge shall thereupon hear and consider the matter so referred.
3. *The Consumer Protection Bureau Act* should provide that, in addition to the existing powers of the Bureau, it has the power:
  - a. to mediate consumer disputes;
  - b. with the consent of the parties, to initiate arbitration in consumer disputes, if mediation fails;
  - c. in appropriate cases, under the direction of the Attorney General, to prosecute any violation of the Consumer Products Warranties Act;
  - d. as an alternative to prosecution, with the consent of the respondent, to issue a cease and desist order covering the practice or behaviour which has been the subject matter of the complaint; and
  - e. where the parties do not agree to arbitration or, notwithstanding such agreement, the matter is of such a nature that a more formal hearing is appropriate, to refer the issue to the Commercial Registration Appeal Tribunal of the Ministry of Consumer and Commercial Relations.
4. *The Consumer Protection Bureau Act* should provide for the establishment of arbitration machinery for carrying out recommendation 3. b., above, consisting initially of a single individual from or designated by the Consumer Protection Bureau in Toronto and from or designated by each Bureau branch office.
5. Once the basic arbitration machinery is operating as described in recommendation 4, above, arbitration committees should be established in those centres and for those consumer industries where the volume of business and necessity for specialization justify this step.
6. Arbitration committess should be established for particular sectors of the consumer industries, and should consist of three persons, one of whom is from the industry in question, one of whom is a member of the consuming public and one of whom is an independent professional person, although not necessarily a lawyer.
7. The fee payable to the arbitrator or arbitration committee should be borne by the Consumer Protection Bureau.
8. Certain of the arbitration committees should also be designated as warranty advisory committees, with one such committee for each major segment of Ontario's consumer industries, with responsibility, under the direction of the Consumer Protection Bureau:
  - a. to employ empirical knowledge about the specialized area dealt with by the committee to attempt to work out satisfactory warranty standards with the industries in question;
  - b. to evaluate product performance;

- c. to assess the adequacy of service and repair facilities provided by the industry; and
- d. to advise the Bureau about all aspects of the industries in question that relate to warranties and consumer protection.

9. The Commercial Registration Appeal Tribunal should have jurisdiction, upon reference of a matter from the Consumer Protection Bureau, to inquire into and determine whether there has been a violation of the Consumer Products Warranties Act, and to assess the quantum of the loss to the complainant, as a matter of restitution, caused by the breach.

10. In a hearing of a matter pursuant to recommendation 9, above, the Commercial Registration Appeal Tribunal should be governed by the provisions of *The Statutory Powers Procedure Act, 1971*, with power to require witnesses to appear, to compel production of documents, and to do all other things necessary for a full and fair hearing.

11. If the Commercial Registration Appeal Tribunal finds a complaint referred to it pursuant to recommendation 3. e., above, to be justified, it should have power to:

- a. make an order for restitution (but not for general damages) in favour of the complainant; and
- b. make an order that the respondent cease and desist from the violation of the particular provisions of the Consumer Products Warranties Act identified by the Tribunal.

12. Where the Consumer Protection Bureau, with the consent of the respondent, issues a cease and desist order in accordance with recommendation 3. d., above, or where the Commercial Registration Appeal Tribunal issues an order pursuant to recommendation 11, above, such an order should be filed in the office of the Registrar of the Supreme Court, whereupon this order should be entered in the same way as a judgment or order of that court and be enforceable as such.

13. *The Consumer Protection Bureau Act* should provide that the establishment and execution of a programme of consumer product testing and performance evaluation should be a function of the Bureau.

14. Means should be provided to the Consumer Protection Bureau to engage in a vigorous and continuing public information programme, including regular publication of:

- a. an account of the activities of the Bureau;
- b. digests of important cases dealt with by mediation, arbitration or consent orders;
- c. reports of cases of violations of the Consumer Products Warranties Act prosecuted by the Bureau under the direction of the Attorney General;
- d. reports of warranty cases referred to the courts by the Lieutenant Governor in Council pursuant to recommendations 1 and 2, above;
- e. reports of cases arising under the Consumer Products Warranties Act that are dealt with by the Commercial Registration Appeal Tribunal; and
- f. reports of the activities and recommendations of the Warranty Advisory Committees.

It is the Ministry's intention to adopt those Commission recommendations that are found suitable for the efficient and economic operation of the Consumer Products Warranties Act. The criteria to be applied to the Commission recommendations and any others received are set out below.

## Choosing a System of Redress Procedures

The following are some of the Ministry's criteria that will be used when choosing the redress procedures to be included in the Consumer Products Warranties Act:

- The redress procedures must be easy to initiate and readily accessible to the consumer.
- The redress procedures must be speedy and inexpensive to the consumer.
- The redress procedures should encourage manufacturers and retailers to assume greater responsibility for their products.
- The redress procedures should emphasize the relationship between the consumer and the manufacturer and retailer and the natural opportunity this relationship affords for informal redress.
- The redress system should involve as few costs to industry and the taxpayer as possible.
- Some means must be found of ensuring that the system does not entail costs of operations which exceed the benefits. In other words, the system must not cost more to settle a claim than the claim itself is worth.
- The redress procedures should be fair to large and small businesses and the public alike.
- The redress system should provide for establishing broad questions of policy, as well as resolving individual complaints.
- The redress procedures should be designed to facilitate the widest possible choice for the consumer between products and places of sale.

## SECTION 8

### THE SCOPE OF THE NEW LEGISLATION

The Ministry accepts the Commission recommendation that a new statute to be known as the Consumer Products Warranties Act be created to deal comprehensively and systematically with all aspects of consumer warranties. This act would apply in lieu of *The Sale of Goods Act* to all persons selling consumer products to consumers in the course of their business and to all manufacturers of such products. The first question to be answered is whether the new legislation is to apply to every category of goods or only to consumer durables such as automobiles, appliances and home entertainment units. The scope of the legislation will largely be determined by several key definitions of consumer, consumer product and consumer transaction.

The Commission suggests a broadly inclusive set of definitions as follows:

#### Who is a Consumer?

The Commission suggests that a consumer be defined as an individual acquiring a consumer product for his own use or consumption or for the use or consumption of another individual (i.e. gifts, or where one person buys something at the request of another.)

#### What is a Consumer Product?

The Commission suggests that a consumer product be defined as meaning goods that are regularly, although not exclusively, bought for personal use or consumption. They further suggest that where the product is to be used for both business and non business purposes, the dominant purpose would govern the characterization of the use.

#### What is Consumer Transaction?

The Commission recommends that a consumer transaction should include sales and near-sale transactions including leases with an option to purchase, leases for substantial terms and contracts for work and materials.

As an example of another approach to definitions, the *United States National Consumer Act* is as follows:

“Consumer” means a person other than an organization who seeks or acquires

- (a) business equipment for use in his business, or
- (b) real or personal property, services, money or credit for personal, family, household or agricultural purposes.

“Organization” means a corporation, government or governmental subdivision or agency, trust, estate, partnership, co-operative or association.

“Consumer transaction” means a transaction in which one or more of the parties is a consumer.

Note: in this example, business transactions are excluded if they involve such credit matters as acquisition of inventory, financing accounts receivable and the like.

#### Determining the Scope of New Legislation

The Ministry has not arrived at its choice of definitions for the new Act and requests that this matter receive public consideration. We believe that the options are:

- (a) Rigid definitions which ignore the borderline transactions.
- (b) Wide basic definition with exceptions written into statute or by regulation as

required. Manufacturers would have the opportunity to show why their products should not be included under the terms of the Act.

- (c) Allow the parties in borderline transactions to agree beforehand that a transaction is a consumer transaction.
- (d) Allow for application to a court or tribunal or the Consumer Protection Bureau for ruling beforehand on whether a transaction is a consumer transaction.





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